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Hints on drawing legislative bills.

LEGISLATIVE REFERENCE BULLETIN No. 1.

HINTS ON DRAWING LEGISLATIVE BILLS.

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ISSUED DEC. 1, 1908.

SACRAMENTO:
W. W. SHANNON, : : : : SUPERINTENDENT STATE PRINTING.
1908.

HINTS ON DRAWING LEGISLATIVE BILLS.

The purpose of this pamphlet is to assist members of the Legislature and others in the drawing of bills.

It is a reflection neither on the intelligence nor the faithfulness of members to say that the workmanship of statutes in the various states of the Union is not what it should be. To draw a bill properly is a difficult piece of work, requiring all the knowledge and skill, not merely of a lawyer, but of a lawyer specially trained for this particular work. ~~James~~ Stuart Mill, in his classical work on Representative Government, says: "There is hardly any kind of intellectual work which so much needs to be done, not only by experienced and exercised minds, but by minds trained to the task through long and laborious study, as the business of making laws."

In his address before the American Bar Association, at Seattle, in 1908, Judge William Schofield said: "To draw a statute modifying the common law in such language as to effect exactly the result intended is one of the most difficult achievements of legal skill."

Notwithstanding the acknowledged difficulty of drawing bills properly, the American states have generally neglected to furnish their legislators with a staff of legislative draftsmen who may bring to their task the skill and experience of specialists and be held responsible for errors. The result is that numerous inaccuracies, ambiguities and contradictions constantly creep into our statutes. These require protracted and repeated litigation before all obscurities are removed. Quite apart from the annoyance and uncertainties caused thereby, these unnecessary lawsuits involve an expense, both to the parties interested and the Commonwealth, far greater than would be the salaries of a corps of expert draftsmen.

The Supreme Court of California has not hesitated to lay the blame for this state of things at the door of the legislators. They say of them: "For their ignorance they, and not the courts, are responsible, and for their omissions they, and not the courts, must find a remedy."

In re Moffitt, 35 Cal. Dec. 379.

The following examples of the trouble that may arise from carelessness or want of skill in the drawing of bills could easily be multiplied many times:

The "pure wine act" of March 7, 1887, was held to be without effect, because an inexperienced draftsman had failed to use words implying

a legal obligation. The act read: "It is desired and required that every seller * * *. shall plainly stencil * * *," etc. Says Paterson, J.: "As words of legislative command these are singularly inappropriate and inconsistent. * * * The word 'desired' can not be ignored—any more than the word 'required,' and the former is at least as forcible in its expression of a request, as the latter is in its expression of command."

Ex parte Koehler, 74 Cal. 43.

The employers' liability act of Congress was declared unconstitutional on account of the omission of the clause "when engaged in interstate commerce."

Employers' Liability Cases, 207 U. S. 463.

In another case, the jurisdiction of courts to issue certain writs was found to depend on the presence or absence of a comma after the word "custody" in section 5, article VI, of the State Constitution.

Kings County vs. *Johnson,* 104 Cal. 198, 203.

While nobody need hope that any degree of skill and care in drawing statutes will prevent ingenious attorneys from construing them differently, according to the conflicting interests of their clients, the chances of quibbling and defeating the intentions of the lawgivers may at least be minimized. The observation of the hints given in this pamphlet may perhaps help to attain this desirable end.

LEGISLATIVE STYLE.

There is no truth in the superstition, apparently widespread, that legal documents must be written in an outlandish style, differing from every other kind of writing. The one quality absolutely essential to a statute, as it is to an attorney's pleading, or a court's opinion, is clearness. This can be attained in exactly the same way as in any other form of composition. Long and involved sentences, useless repetitions, the insertion of superfluous words, or phrases without a definite meaning, render a statute obscure or ambiguous. Whenever possible, ordinary language should be used, but with careful precision and accuracy. In many cases, however, the use of technical terms can not be avoided for the reason that these are the only means of expressing definitely the intended sense. Technical terms may be either of a legal kind, or those pertaining to the subject-matter with which the statute deals, as, for instance, a trade or profession. Care should of course be taken to use such words with scrupulous correctness. As to legal terms, it is a rule invariably observed by the courts to construe words *having a definite legal meaning* according to such technical sense, even

if in ordinary speech they may bear a different construction. The only exception to this rule is where the context makes it quite evident that the ordinary meaning is intended. Where a doubt exists as to the precise meaning of some such word, the draftsman should consult a law dictionary. A large collection of these is found in the State Library. Probably the most serviceable of them is the work known as "Words and Phrases."

In addition to the common-law rule regarding the construction of technical expressions, the draftsman must not overlook the chapters of the several codes, in which the meaning of certain words and phrases is authoritatively construed.

Civil Code, sections 12, 13, 14.
Code Civ. Proc., sections 4, 5, 16, 17.
Pol. Code, sections 4, 5, 16, 17.
Penal Code, sections 4, 5, 7.

An important detail is not to make the meaning depend on punctuation. A comma may easily be inserted or omitted by the error of typewriter or printer. A case where litigation was, in part, based on the absence of a comma was cited above. In another case, the decision would have been the reverse of what it was if an additional comma had been present.

State vs. *Underground Cable Co.,* 18 Atl. Rep. 581.

Provisos containing exceptions to general rules established by the section to which they are appended should be avoided as much as possible. In most cases, the rule contained in the proviso can be more plainly stated in an independent section. "Provisos are the convenient avenues of escape for the inexperienced lawmaker."

Ordronaux, Constitutional Legislation, 618.

When an act deals with a subject-matter treated also in other acts, the courts will, in construing it, assume that the Legislature had in mind not only all such other statutes, but also all court decisions construing them. It is absolutely necessary, therefore, before drawing a bill to study such other acts, as well as the decisions. Says the Supreme Court of California: "A familiar and fundamental rule for the interpretation of a legislative statute is that it is presumed to have been enacted in the light of such judicial decisions as have a direct bearing upon it."

In re Moffitt, 35 Cal. Dec. 378.

A common fault of draftsmen is the mechanical use of certain set forms and phrases, regardless of whether they are applicable or not. It should be remembered that the courts will give to every word or even letter in an act some meaning, if by any reasonable possibility this can

be done. Therefore, care must be taken not to use a single word without a definite object in view.

Among the "don'ts" which it will be good for the legislator to bear in mind may be mentioned also the following:

Do not say "may" when you mean "shall," or the reverse. "May" implies a discretion, "shall" is imperative.

Do not use the passive mood when the active will serve. Expression in the active mood is apt to be much clearer. For instance, it is better to say: "The proper officer shall give notice" than "notice shall be given by," etc.

Do not use the word "license" when you mean "license fee" or "license tax." A license is a permission to do a thing; such permission may or may not be made conditional on the payment of a tax or fee.

These suggestions apply, of course, to local ordinances or by-laws as well as to state statutes.

At the State Library there are numerous books on the subject of legislative draftsmanship and the construction of statutes after they are enacted. Among these are:

Ilbert, Sir Courtenay.
Legislative methods and forms.

Thring, Henry (Lord).
Practical legislation.

Dwarris, Sir Fortunatus.
A treatise on statutes.

Endlich, G. A.
Commentaries on the interpretation of statutes.

Hardcastle, H.
The construction and effect of statute law.

Sedgwick, Henry.
Rules which govern the construction of statutes and constitutions.

Sutherland, J. G.
Statutes and statutory construction.

THE ARRANGEMENT OF STATUTES.

The State of California has adopted the system of arranging its statute law in a series of four codes: The political code, dealing with the administration of government; the penal code, treating of crimes and the manner of prosecuting and punishing offenders; the civil code, containing the law concerning the relations of individuals to each other; and the code of civil procedure, providing for the protection of individual rights in the courts. The four codes must be taken together as

one body of the law. Provisions are not ineffective because put in the wrong code; as, for instance, matter of substantive law in the code of civil procedure, or matters relating to a civil right in the penal code.

Enos vs. *Snyder,* 131 Cal. 68.

Notwithstanding this rule, it is highly desirable that bills should be drawn in the form of amendments to the codes, whenever the subject of the bill is such an amendment in fact. Otherwise it will be necessary for the Code Commissioner to submit a new bill to the following legislature for the purpose of placing the new measure in the proper place, when it might as well have been put there in the first place. It needs no argument that this is a cumbersome and confusing method.

Laws not contained in the codes, but of a permanent nature, have been collected in volumes entitled "General Laws," published by two firms issuing the codes.

Where a bill provides for large number of changes, thus in effect amending various sections scattered in different portions of a code, or even in more than one code, it is advisable to give it the form of a general act, rather than that of a code amendment. Otherwise one runs the risk, on the one hand, of not finding all the sections actually to be amended, and on the other hand that of conflicting with the constitutional requirement that each act must have but one subject-matter. The general act will by implication repeal any part of the whole law conflicting with itself, while in an act amendatory of a particular code section serious questions may arise concerning the effect of the amendment on other sections of the code.

The division of the codes, or any act, into sections is merely for the purpose of finding one's way through it conveniently. The whole act is construed as a single instrument, and the division can not interfere with a construction giving effect to the evident intention of the Legislature.

Est. of Bull, 35 Cal. Dec. 628.

Nevertheless, the utmost care is necessary in numbering sections added to a code. Especially, if the Legislature should pass two bills, each adding a new section to a code, and each numbering the new section alike, great confusion may arise. This happened to the street improvement law (the "Vrooman Act"), and gave rise to doubts concerning the validity of one of the amendatory acts. These doubts are not yet definitely settled.

Hellman vs. *Shoulters,* 114 Cal. 154.

In numbering new code sections, no uniformity has, unfortunately, been observed where sections have been inserted between consecutively numbered sections. Sometimes this style has been adopted: Section 1½, 1¾, etc. In other places one reads: 1a, 1b, and so forth. The

latter style seems preferable because it permits of greater expansion without becoming cumbersome. It would seem wise to use it exclusively.

Very long sections are to be avoided, because short sections, each dealing with a single detail, are more easily understood. Where, in a long bill, the number of such sections is very large, it is wise to distribute them in separate chapters, and if necessary, the chapters in different parts. For an example of unwieldy, long sections, not even divided into subsections, see the general municipal corporations act.

In bills relating to the duties of the various administrative departments of the State, care should be taken to conform to existing rules of practice. It is not usually necessary to prescribe in detail the working methods of public officers, for these ought to be competent to devise such themselves. Where such detail is for any reason deemed expedient, care should be had not to cause additional work and expense; as, for instance, by a distinct system of payment or bookkeeping. There are provisions of the Political Code (Art. XVIII, sections 654-685) prescribing the manner in which payments out of the State treasury shall be made. They apply to all new acts, unless these prescribe a different mode, which would rarely be wise. On the other hand, where no general law regulates a matter, necessary detail should not be overlooked. For example: Section 1492 of the Political Code provides that normal school trustees, when sitting as a joint board, shall receive "mileage," but does not state how much. There is nowhere a general provision fixing the amount of mileage. In section 1491 the same code provides that the normal school trustees, when acting as separate boards shall "be allowed their expenses." Such lack of uniformity can hardly have an intelligent purpose. It must be explained, probably, by the draftsman's neglect of comparing all the statutes dealing with the same general subject.

CONSTITUTIONAL REQUIREMENTS.

The drawing of bills in this State, as in most other states of the Union, is complicated by certain requirements of the Constitution regarding the form of acts. These are contained in sections 1 and 24 of article IV of the State Constitution.

Section 1 provides that the enacting clause of every law shall be as follows: "The People of the State of California, represented in Senate and Assembly, do enact as follows."

The enacting clause of a statute is what characterizes it as a law, and can not possibly be dispensed with. Nevertheless, the bills preserved in the State Library show not a few instances where it has been omitted. It is not likely that a bill with this defect could be passed *without the omission* being supplied, but the inexperienced draftsman *would expose himself to ridicule.*

The formula prescribed in this section must be followed exactly, on pain of the act being invalid, because the Constitution expressly makes its provisions mandatory (section 22, article I).

Section 24 contains two very important provisions:

1. Every act shall embrace but one subject.
2. This subject shall be expressed in the title.

1. *One subject.* This provision does not require that a measure intended to regulate an important subject be split up into numerous bills, each covering a particular branch; as, for instance, where several code sections, dealing with prevention of forest fires were to be amended, it was not necessary to make a separate bill for each section. The rule simply means that two or more subjects, having no organic connection with each other, shall not be treated in a single act.

Said Patterson, J.: "However numerous the provisions of an act may be, if they can be fairly considered as falling within the subject-matter of legislation, or as proper methods for the attainment of the end sought by the act, there is no conflict with the constitutional provision above quoted."

Ex parte Kohler, 74 Cal. 41.

See, also, *Kings County* vs. *Johnson,* 104 Cal. 203.

An example of what different matters are still within the one general subject is where the issue of bonds was properly included in an act to provide for work upon streets.

Hellman vs. *Shoulters,* 114 Cal. 136, 150.

On the other hand, the following are instances where distinct subjects had been improperly joined:

Sanitary districts and liquor selling.

In re Werner, 129 Cal. 567.

Hydraulic mining and drainage.

People vs. *Parks,* 58 Cal. 624.

Fees and inheritance tax.

Fatjo vs. *Pfister,* 117 Cal. 86.

Special care must be taken where an appropriation is involved. In addition to the restrictions in section 24, section 34 of article IV provides that "no bill making an appropriation of money, except the general appropriation bill, shall contain more than one item of appropriation, and that for one single and certain purpose to be therein expressed." But here also it is not necessary to split the appropriation into its component parts, with separate bills for each; as, for instance, in a bill to establish some institution, one bill for the purchase of land, another for the erection of a building, etc.

People vs. *Dunn,* 80 Cal. 211.

In connection with the above, attention may be called to the fact that the codes can not be revised by a single act, but only by a separate bill for each distinct subject treated in them. An attempt at general revision was made some years ago, but the result, the so-called Pomeroy codes, was held to be invalid by the Supreme Court. The original codes themselves are valid only because the restrictive provision contained in the old constitution, under which they were passed, was held to be merely directory.

Lewis vs. *Dunne,* 134 Cal. 292.

2. *The title.* At common law, as expressed by a rule of the speaker of the British House of Commons, of May 3, 1894, "all that is necessary is that the title of the bill shall be in general terms and cover the general scope and purpose so as to include all the subject-matters comprised in the bill." This is still the rule, under the constitutional provisions, except that the subject-matter must be a single one. The provision has for its object the prevention of fraud by misleading titles, and should receive a broad and liberal, not a narrow and technical construction.

Abeel vs. *Clark,* 84 Cal. 226.

Ex parte Liddell, 93 Cal. 634.

Consequently, the title need not be an enumeration of all the contents of the bill. As Mr. Justice Shaw has well put it: "If it were necessary to mention every subdivision, our statutes would present a somewhat ludicrous appearance. The statement of the subject in the title would generally occupy almost as much space as the act itself."

Robinson vs. *Kerrigan,* 151 Cal. 51.

The following words of Mr. Justice Temple should also be remembered: "I see nothing in the constitutional provision which requires that the title shall disclose the purpose and scope of the act. It is enough if it intelligibly refers the reader to the subject to which the act applies or which is affected by it."

Hellman vs. *Shoulters,* 114 Cal. 150.

Nor need the title enumerate the means by which the purpose of the act is to be accomplished, even where these means are not those ordinarily resorted to.

San Francisco vs. *Kiernan,* 98 Cal. 614, 622.

See also, on this general subject:

People vs. *Superior Court,* 100 Cal. 105.

People vs. *Linda Vista Irrigation District,* 128 Cal. 477.

Notwithstanding the rule is thus clearly explained by our Supreme Court, a great many bills are introduced at every session, preceded by *long and cumbersome* titles, sometimes covering almost a page and constituting *practically a table* of contents. This is not only awkward,

wasteful of printers' ink and paper, and calculated to strain the patience of all who ever have to cite the act by title, but positively dangerous to the validity of the act. For the enumeration of different things invites the charge that the act contains more than one subject. If the branches of the subject are specially enumerated and a general phrase including all omitted, it may easily happen that some provision is left out of the title, and therefore perhaps ineffective in the body of the act; while, if a properly inclusive general expression is used, the separate enumeration is utterly superfluous.

The only exception to the rule not to specify the separate provisions is in the case of an appropriation clause. It is best to add "and making an appropriation therefor" to the general expression in the title, not because the Constitution requires it, but because appropriation bills take a somewhat different course from ordinary bills, and should be easily recognizable. (See Senate Rule 31; Assembly Rule 10.)

An example of how a title enumerating the various parts of a general subject invites an attack for duplicity is the act of March 19, 1878, entitled "An act to legalize the assessment of taxes in the city and county of San Francisco, and to ratify and confirm a resolution of the board of supervisors," etc.

San Francisco vs. *Spring Valley Water Works,* 54 Cal. 571.

The words "and for other purposes" should never be added to a title. They are either superfluous, or indicate that the bill has more than one subject.

People vs. *Parks,* 58 Cal. 624.

Spier vs. *Baker,* 120 Cal. 370.

Where a bill seeks to amend one or more sections of an existing law, it is best to state briefly the purpose of the amendment in the title. Where more than one section of a code is to be amended in one bill, this seems almost necessary to prevent an attack of duplicity.

The following form of title of a bill amending a code has been approved by the Supreme Court, and is a good model:

"An act to amend sections——of the——Code——relating to——and to add——new sections numbered——."

Railway Co. vs. *Board of Equalization,* 60 Cal. 12.

In amending an act passed under the old constitution, when full expression of the subject in the title was not mandatory, it is not necessary to state the subject more fully than in the act so amended.

People vs. *Parvin,* 74 Cal. 553.

Where an act or section that has previously been amended is to be amended again, it is not necessary to recite in the title all the successive amendments.

Fletcher vs. *Prather,* 102 Cal. 413.